

**BEFORE THE SECRETARY OF STATE
STATE OF COLORADO**

CASE NO. OS 2005-0009

AGENCY DECISION

**IN THE MATTER OF THE COMPLAINT FILED BY STEPHEN FISH REGARDING
ALLEGED CAMPAIGN AND POLITICAL FINANCE VIOLATIONS BY WILLIAM H. KAIN**

This matter is before the Division of Administrative Hearings (Division) on the complaint of Stephen Fish (Fish) against William H. Kain (Kain). Fish's complaint was filed with the Colorado Secretary of State on April 27, 2005, and was referred to the Division for handling as required by Colo. Const. art. XXVII, sec. 9(2)(a).

The complaint alleges that Kain, the Grand Junction Daily Sentinel (Daily Sentinel) and Mesa County District Attorney Pete Hautzinger violated certain provisions of the Fair Campaign Practices Act (FCPA), §§ 1-45-101, *et seq.* C.R.S. (2004). Judge Norcross entered a procedural order severing the Daily Sentinel and District Attorney Hautzinger as parties from this proceeding. The allegations against those parties will be separately adjudicated under Case No. OS 2005-0012. This Agency Decision resolves only those issues in the complaint that pertain to Kain.

Hearing in this matter was held on May 23, 2005, before Chief Administrative Law Judge Michael S. Williams (ALJ). The hearing was digitally recorded in Courtroom C. Fish appeared and initially represented himself. During the course of the proceedings he withdrew his representation and his wife, Ann L. Duckett, Esq., entered her appearance on his behalf. Kain was represented by Craig F. Wallace, Esq. The parties stipulated to the admission of Complainant's Exhibits A - HH and Respondent's Exhibits 1 -11. The Exhibits were admitted and are part of the record in this matter.

PRELIMINARY MATTERS

Following the hearing, the parties were given until the close of business Friday, May 27, 2005, to file Position Statements. They were limited to five pages. Fish timely filed his Position Statement consistent with the ALJ's order. Kain timely filed a Position Statement in excess of the five page limit. At the same time, Kain filed a Motion to Exceed the Five Page Limit. The Motion is denied and the ALJ did not consider Kain's Position Statement beyond the fifth page.

STATEMENT OF THE ISSUE

The issue to be determined is whether Kain violated the Colorado Constitution and the FCPA by failing to properly register as a political committee with the Secretary of State before making expenditures and accepting a contribution in an effort to oppose Mesa County District Attorney candidate Ann Duckett.

FINDINGS OF FACT

Based upon the evidence presented at the hearing, the ALJ finds as fact that:

1. The election for Mesa County District Attorney (21st Judicial District), was held on November 2, 2004. The candidates in the election were Pete Hautzinger who ran as the Republican candidate and Ann Duckett who ran as an Independent candidate. Ann Duckett is Fish's wife.

2. William H. Kain, is an attorney who resides and practices law in Grand Junction, Colorado. Kain is a former Mesa County District Attorney. He served on an advisory committee for candidate Hautzinger during the 2004 campaign. He did not serve on candidate Hautzinger's campaign committee.

3. Prior to the November election, candidate Duckett 's campaign ran billboard, newspaper and other advertising. The gist of the advertising was that candidate Duckett was more experienced than Hautzinger. Kain believed that candidate Duckett's advertising was inaccurate. Kain also believed that candidate Hautzinger was the more experienced candidate. Kain felt that something should be done in response to candidate Duckett's advertising in order to assist candidate Hautzinger.

4. On October 26, 2004, Kain delivered a check in the amount of \$1,381.83 to the offices of the Daily Sentinel in Grand Junction. The check was drawn on the bank account of William H. Kain, Attorney at Law, a sole proprietor. The check was paid to the Daily Sentinel as compensation for advertisements that were to be printed in the paper on October 29, October 31, and November 1, 2004. Each of the advertisements ultimately contained the identifying information at bottom, "Paid for by the Committee for Truth in Local Politics." The content of the three advertisements expressly supported candidate Hautzinger .

5. On October 26, 2004, after the Kain check had been delivered to the Daily Sentinel, Kain received a telephone call from W.L. Wilson. Kain did not know Wilson. During the telephone conversation, Wilson stated to Kain that he wanted to give Kain money to help pay for the advertisements in the Daily Sentinel. Kain agreed to accept the money from Wilson. The amount that they agreed to was \$550.00.

6. On October 26 or 27, 2004, Wilson delivered a check for \$550.00 to Kain's law office. The check was dated October 26, 2004, and was drawn on the Alpine Bank account

of W.L. Wilson and Joan Wilson. It was made out to William H. Kain and signed by W.L. Wilson. The bottom left hand corner of the check had the notation, "for contr for advertising" written on it. The check was deposited on October 29, 2004, into the Wells Fargo Bank account for Kain's law firm.

7. On October 28, 2004, Kain filed a Committee Registration Form and Report of Contribution and Expenditures for the Committee for Truth in Local Politics (Committee) at the Mesa County Clerk and Recorder's office. Both documents were signed by Kain as the registered agent for the Committee. Also on October 28, a Notice of Independent Expenditure in Excess of One Thousand Dollars was filed with the Mesa County Clerk and Recorder's office. The notice was signed by Kain as the disclosing individual.

8. On November 17, 2004, Kain filed a Report of Contributions and Expenditures for the Committee was filed at the Mesa County Clerk and Recorder's office.

9. On January 5, 2005, Kain filed a Report of Contributions and Expenditures/Termination Report at the Secretary of State's office. The report was signed by Kain as registered agent (treasurer) and was undated. The Secretary of State stamped this filing, "Wrong Jurisdiction," and posted the document on its website. This same report was filed with the Mesa County Clerk and Recorder's office on January 6, 2005 and filed in hard copy with the Secretary of State on January 10, 2005.

10. Kain worked closely with the Mesa County Clerk and Recorder's office to try to comply with the filing requirements. His understanding from his discussions with an employee from the Mesa County Clerk and Recorder's office was that he had met those requirements. Kain's close coordination with the Mesa County Clerk and Recorder's office resulted in his good faith belief that he had properly filed the registration documents. There is no evidence of an intentional violation of the registration requirement.

11. The Mesa County Clerk and Recorder's office is not an agent of the Secretary of State for the purposes of filings related to elections for the District Attorney.

12. On April 13, 2005, Fish filed a document with the Secretary of State entitled "Campaign an Political Finance Complaints." Fish stated in that document that, "I am filing this written complaint with your Office and respectfully requesting that you investigate the matter described below and review the enclosures for violations of the Colorado laws." The April 13, 2005, document specifically identified Kain and the Committee and raised a question as to the registration status of the Committee. The document contained the names and addresses of Fish and Kain and was signed by Fish. The Secretary of State returned the document to Fish with a cover letter informing him that the Secretary of State's office did not investigate complaints and referring him to the procedures contained in the FCPA.

13. Fish re-filed his complaint with the Secretary of State on April 27, 2005, and requested that the matter be heard by the Division. The Secretary of State's office referred

copies of the re-filed complaint, together with the original April 13, 2005 document, to the Division on April 27, 2005.

14. On May 9, 2005, Kain filed copies of the Committee Registration Form and Notice of Independent Expenditure in Excess of One Thousand Dollars at the Secretary of State's office.

CONCLUSIONS OF LAW

Based upon the foregoing findings of fact, the ALJ concludes as a matter of law that:

1. The complaint in this matter was filed with the Secretary of State on April 13, 2005. Secretary of State Rule 6.3 (8 CCR 1505-6) sets forth the requirements for filing a written complaint with the Secretary of State. The contents of the complaint must include: "the name, address, and signature of the complainant; the name and address of each respondent alleged to have committed a violation; and the particulars of the violation." While the April 13, 2005, document requested an "investigation" of the allegations set forth therein, it was also entitled "Campaign and Political Finance Complaints." The document identified Fish, Kain and the Committee. It also clearly identified a problem with the registration status of the Committee. The names and addresses Fish and Kain were included in the document and it was signed by Fish. The ALJ concludes that the document submitted to the Secretary of State on April 13, 2005, meets the requirements of Rule 6.3 and constitutes a valid complaint.

As discussed below in Conclusions of Law, paragraphs 6 and 7, an unregistered political committee was formed on October 29, 2004. The registration violation referred to in the complaint (failure of the Committee to register) took place on that date. The complaint was thus filed with the Secretary of State 166 days after the violation took place. The complaint was filed within the 180-day requirement set forth in Colo. Const. art. XXVIII, sec. 9(2)(a). The complaint would still be considered timely filed even if the date of filing of the complaint is calculated to April 27, 2005 (the date the re-filed complaint was received by the Secretary of State). April 27, 2005, is exactly 180 days from October 29, 2005, the date of the violation.

2. Fish, however, is limited to the registration issue he set forth in the April 13 and April 17 complaints. Namely, the alleged violation of campaign laws based upon the unregistered status of the Committee. No other basis for the complaint can be reasonably inferred. Fish's attempt to expand his complaint through his May 19, 2005, filing entitled "Stephen Fish's Request to More Fully Describe the Particulars of the Complaint for Consideration at Hearing May 23, 2005" fails. The additional issues which Fish attempted to include could have been raised in his original complaint. They are, therefore, not timely.

3. The Secretary of State and the ALJ have jurisdiction over this complaint.

4. Colo. Const. art. XXVIII, sec. 9(1)(f) requires that the hearing in this matter be in

accordance with the Colorado Administrative Procedure Act, § 24-4-105, C.R.S. (2004). The proponent of an order has the burden of proof. See § 24-4-105(7), C.R.S. (2004). Fish is the proponent of an order for the imposition of a civil penalty against Kain. Fish, therefore, has the burden of proof in this matter and must prove by preponderant evidence that the legal elements establishing a violation have been met.

5. The issues in this case are limited to a determination as to whether Kain has violated Colo. Const. art. XXVIII, sections 3 through 7 or 9(1)(e) or §§ 1-45-108, 114, 115 or 117, C.R.S. (2004). See Colo. Const. art. XXVIII, sec. 9(2)(a). If the ALJ determines that a violation of one of these provisions has occurred then he must issue an appropriate order, sanction or relief authorized by Colo. Const. art. XXVIII, sec. 9(2)(a).

6. Kain and Wilson formed a political committee within the meaning of Colo. Const. art. XXVIII, sec. 2(12)(a), on October 29, 2004 when Kain deposited Wilson's check in the Wells Fargo Bank account of his law firm. Section 2(12)(a) states that, "Political committee' means any person, other than a natural person, or any group of two or more persons, including natural persons that have accepted or made contributions or expenditures in excess of \$200 to support or oppose the nomination or election of one or more candidates." Secretary of State Rule 4.3 (8 CCR 1505-6) specifies that in the case of contributions by check, the date the check is accepted is the date it is deposited into the party's or committee's bank account. The deposit of Wilson's check in the amount of \$550 for the purpose of contributing to the purchase of advertisements in the Daily Sentinel for the purpose of promoting the candidacy of Pete Hautzinger and opposing the candidacy of Ann Duckett, created a political committee as of the deposit date of October 29, 2004.

7. Under § 1-45-108(3), C.R.S. (2004) Kain was required to register the Committee with the appropriate officer prior to accepting any contributions. The appropriate officer for the purpose of registering in an election for District Attorney is the Secretary of State. See § 1-45-109 (1), C.R.S. (2004). On October 28, 2004, Kain *attempted* to register as a political committee and file other documents. Rather than file the required documents with the Secretary of State, however, he filed them with the Mesa County Clerk and Recorder's office. That office is not an agent of the Secretary of State for purposes of these types of filings. Kain's political committee, therefore, was not properly registered with the Secretary of State prior to the October 29, 2004, acceptance of Wilson's contribution. Kain's failure to properly register as a political committee with the Secretary of State prior to the acceptance of the contribution was a violation of § 1-45-108(3), C.R.S. (2004).

8. Colo. Const. art. XXVIII, sec. 10(2)(b)(I) allows the ALJ to set aside or reduce penalties upon showing of good cause. Kain has shown good cause to reduce the penalty by establishing his good faith belief that he properly filed the required registration and through his other demonstrated efforts to comply.

AGENCY DECISION

Kain violated § 1-45-108(3), C.R.S. (2004) when he failed to register the Committee prior to accepting a contribution on October 29, 2004. Upon determination by an administrative law judge that a violation of § 1-45-108, C.R.S. (2004) has occurred the judge must issue a decision that includes any appropriate order or relief authorized by Article XXVIII. See Colo. Const. art. XXVIII, sec. 9 (2)(a). The sanction imposed for a failure to file pursuant to § 1-45-108 is a \$50 per day fine for each day the required filing has not been made. See Colo. Const. art. XXVIII, sec. 10 (2)(a). Kain should have properly registered his political committee with the Secretary of State prior to accepting Wilson's \$550.00 check on October 29, 2004. Kain ultimately filed the appropriate documentation with the Secretary of State on May 9, 2005. The period between October 29, 2004, and May 9, 2005, is 193 days. A strict application of the constitutional sanction would result in a fine of \$9,650 (193 x \$50).

Colo. Const. art. XXVIII, sec. 10 (2)(b)(I) permits the administrative law judge to set aside or reduce a penalty upon showing of good cause. Kain has shown a measure of good cause which must be considered prior to the determination of a sanction. First, he attempted to file the required documents on October 28, 2004, prior to his October 29, 2004, acceptance/deposit of the Wilson check. Second, he worked closely with the Mesa County Clerk and Recorder's office to try to comply with the filing requirements. Additionally, there is no persuasive evidence of an intentional filing violation.

Two disconcerting factors, however, work to blunt the effect of Kain's efforts. First, his reliance on the advice of an employee of the Mesa County Clerk and Recorder's office does not obviate his obligation to know the law. Second, the public is entitled to rely on the law requiring political committees to register and file disclosures with the Secretary of State's office. By not filing properly, Kain prevented the public from being able to scrutinize the transactions, expenditures and possible contributions of the Committee. Kain has not shown sufficient good cause to set aside the fine amount. On balance, however, he has shown good cause to reduce the fine amount.

A fine of \$9,600 in this case would be excessive and disproportionate to the violation. Balancing the showing of good cause against the need to have meaningful enforcement of the political committee registration requirement, the ALJ reduces the fine amount from \$50 per day to \$10 per day for the violation period. Therefore, based upon the foregoing, the findings of fact and conclusions of law, the ALJ imposes a **penalty of \$1,930.00** against William H. Kain for a single violation of § 1-45-108(3), C.R.S. (2004).

The penalty is to be paid in accordance with the requirements of the Secretary of State's rules, policies and procedures.

Dated: June 7, 2005.

MICHAEL S. WILLIAMS
Chief Administrative Law Judge

CERTIFICATE OF SERVICE

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On this _____ day of June, 2005

Technician IV